

Message Text

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C O N F I D E N T I A L SECTION 01 OF 03 GENEVA 06119

USEEC

E.O. 11652: GDS
TAGS: PLOS
SUBJECT: LOS-POLLUTION PROPOSALS

1. FOLLOWING SANITIZED VERSION OF ENVIRONMENTAL TASK
FORCE REPORT PASSED TO G-5, CANADA AND AUSTRALIA, WITH
COMPLIMENTARY COPIES TO CHAIRMAN YANKOV (COMMITTEE III)
AND WORKING GROUP CHAIRMAN VALLARTA, MEXICO. A COPY WAS
PASSED BY THE UK TO THE FRG.

BEGIN QUOTE - THE FUNCTION OF A NEW LAW OF THE SEA CON-
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VENTION IS TO PROVIDE A LONG-TERM FRAMEWORK FOR
STABILIZING THE LAW OF THE SEA AND REGULATING ASSERTIONS
OF NATIONAL SOVEREIGNTY, RIGHTS AND JURISDICTION IN THE
OCEANS. ITS CURRENT ENVIRONMENTAL PROVISIONS NOW APPEAR
TO BE INADEQUATE TO THIS END, BOTH AS A CREDIBLE GUIDE
FOR NATIONAL ACTION AND AS A SOURCE OF SUPPORT FOR
RATIFICATION.

FAILURE TO COMPLETE THE LAW OF THE SEA CONVENTION INEVITABLY EXPOSES PROPOSED PROVISIONS TO CHANGING CIRCUMSTANCES AND PERCEPTIONS. THIS IS PARTICULARLY TRUE IN THE CASE OF ENVIRONMENTAL PROTECTION, WHERE LESS INTERNATIONAL LEGAL EXPERIENCE IS AVAILABLE TO GUIDE US. IN THIS CASE, THE RESULT MAY BE FELICITOUS, AS THERE MAY STILL BE TIME TO AVOID LESS DESIRABLE ALTERNATIVES AND SERIOUS OBSTACLES IN THE WAY OF ACHIEVING AN OVERALL WIDELY ACCEPTED TREATY.

THIS MEMORANDUM OUTLINES A MODERATE APPROACH TO THE QUESTION OF IMPROVEMENTS IN THE ICNT AND INTERNATIONAL LAW ON MATTERS OF POLLUTION CONTROL. IT DOES NOT CONTAIN SUGGESTIONS FOR CHANGES IN PARTS II AND VII OF THE ICNT, ALTHOUGH THOSE ARE THE SOURCE OF SOME DIFFICULTIES. IT DOES NOT SUGGEST A MAJOR RE-EVALUATION OF THE EMPHASIS ON INTERNATIONAL STANDARDS, IN THE HOPE THAT TIMELY AGREEMENT CAN BE REACHED AT THIS SESSION RESULTING IN AN ADEQUATE GROUP OF TEXTUAL CHANGES AND OTHER STEPS. IT DOES NOT OVER-REACT TO RECENT EVENTS WITH PROPOSALS FOR VASTLY EXPANDED COASTAL STATE PREVENTIVE JURISDICTION EMBRACING NAVIGATIONAL AS WELL AS OTHER CAUSES OF POLLUTION. IT DOES NOT RELY UPON THE TACTICAL REVIVAL OF MORE FAR REACHING IDEAS TO UNDERSCORE ITS MODERATION. IT SEEKS ONLY TO ADJUST AND CLARIFY PROVISIONS WITHIN THE FRAMEWORK OF EXISTING INTERNATIONAL LAW AND THE ICNT.

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THE ICNT WOULD MAKE AN UNQUALIFIEDLY WELCOME CONTRIBUTION TO THE FURTHER DEVELOPMENT OF THE LAW OF INNOCENT PASSAGE WERE IT NOT FOR THE ACCOMPANYING RESTRICTIONS ON ENVIRONMENTAL PROTECTION MEASURES. TOO MANY COASTAL STATE ENVIRONMENTAL MEASURES, ENACTED ON THE BASIS OF GOOD FAITH INTERPRETATIONS AND APPLICATION OF EXISTING INTERNATIONAL LAW, ARE ENGAGED. THE SUGGESTED CHANGES ARE ALL DESIGNED TO ELIMINATE OR MODERATE THE EFFECT OF ICNT PROVISIONS THAT THEMSELVES REDUCE OR ELIMINATE EXISTING COASTAL STATE RIGHTS AND SOVEREIGNTY IN THE TERRITORIAL SEA UNDER THE 1958 CONVENTION AND CUSTOMARY LAW. IN THIS REGARD, ONE MUST BEAR IN MIND THAT THESE SUGGESTIONS REGARDING CONTROL OF POLLUTION IN RESPECT OF INNOCENT PASSAGE ARE MADE IN THE CONTEXT OF A 12-MILE MAXIMUM TERRITORIAL SEA, AND A SEPARATE REGIME OF TRANSIT PASSAGE OF STRAITS, NEITHER OF WHICH WOULD BE AFFECTED.

WITH RESPECT TO THE ECONOMIC ZONE, THE THEORY OF THE ICNT IS THAT PROTECTION OF NAVIGATION IS BEST SERVED BY THE MAINTENANCE OF EXCLUSIVELY INTERNATIONAL AND INTERNATIONALLY APPROVED STANDARDS, WHILE THE PROTECTION OF THE

ENVIRONMENT IS BEST SERVED BY EXPANDING THE OPPORTUNITIES
FOR ENFORCEMENT OF THOSE STANDARDS. IF THIS SYSTEM IS
TO BE FULLY ACCEPTED, WE MUST PROCEED NOT ONLY ON THE
ASSUMPTION THAT MARITIME COUNTRIES ARE ALREADY COMMITTED
TO SEEKING EVER HIGHER INTERNATIONAL STANDARDS IN THE
APPROPRIATE ORGANIZATION, BUT THAT THE SYSTEM ITSELF IS
FAIRLY AND UNAMBIGUOUSLY SET FORTH IN THE TEXT. IN THIS
CONNECTION, THOSE WHO ARE RELUCTANT TO ACCEPT A SYSTEM
OF EXCLUSIVE INTERNATIONAL STANDARDS MIGHT MISCONSTRUE
AN UNWILLINGNESS TO CLARIFY THE SYSTEM AS AN ABSENCE OF
REAL COMMITMENT TO THE UNDERLYING ACCOMMODATION.
THE VARYING USE OF THE TERMS "GENERALLY ACCEPTED" AND
"APPLICABLE" IS BUT ONE EXAMPLE OF THE DIFFICULTY IN THIS
REGARD, PARTICULARLY SINCE A POSSIBLE, IF ERRONEOUS,
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APPROACH TO INTERPRETATION OF THE WORD "APPLICABLE"
WOULD BE TO ELIMINATE THE DUTY OF THE COASTAL STATE TO
APPLY ONLY INTERNATIONAL STANDARDS, IRRESPECTIVE OF ITS
OWN ACTIONS ON TREATIES, OR TO ELIMINATE THE DUTY OF A
FLAG STATE THAT HAD NOT RATIFIED THE RELEVANT TREATY TO

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RESPECT INTERNATIONAL STANDARDS. NEVERTHELESS, THIS IS ESSENTIALLY A PROBLEM OF CONFORMITY OF TEXTS THAT COULD BE DEFERRED TO THE DRAFTING STAGE IF THIS IS DEEMED PREFERABLE.

THE ENFORCEMENT SYSTEM IN THE ECONOMIC ZONE SEEMS, AS PRESENTLY DRAFTED, INSUFFICIENTLY PROTECTIVE OF BOTH NAVIGATION AND ENVIRONMENTAL INTERESTS. THE PROVISIONS REGARDING ARREST IN THE ECONOMIC ZONE ARE RIFE WITH SUBJECTIVE STANDARDS THAT LEND THEMSELVES TO CONFUSION AND ABUSE. IT IS ESSENTIAL THAT AN OBJECTIVE
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SET OF CIRCUMSTANCES BE PRESENT BEFORE AN ARREST CAN OCCUR. SUBJECTIVE CRITERIA SUCH AS "GROSS," "FLAGRANT," OR "MAJOR" ARE NOT LIKELY TO PROTECT SHIPPING ADEQUATELY FROM ABUSE OF DISCRETION, NOR ARE THEY LIKELY TO GIVE ANY REAL GUIDANCE TO COASTAL STATES ATTEMPTING TO CONFORM THEIR ACTIONS STRICTLY TO REQUIREMENTS OF THE TREATY. SIMILARLY, THE IDEA THAT A COASTAL STATE SHOULD BE REQUIRED TO SUSPEND PROCEEDINGS IN ITS COURTS WITH RESPECT TO DISCHARGES IN ITS ECONOMIC ZONE OR THAT THREATEN ITS COASTLINE OR RELATED INTERESTS REQUIRES SERIOUS RECONSIDERATION.

VARIOUS OTHER CORRECTIONS AND CLARIFICATIONS ARE ALSO DESIRABLE. SOME OF THESE, SUCH AS THE PROVISION FOR NOTICE, COOPERATION IN ROUTING AND THE DEFINITION OF "MARITIME CASUALTY," ARE BASED UPON AND DESIGNED TO EMPHASIZE EXISTING IMCO CONVENTIONS AND PRACTICES.

TEXT OF PROPOSALS:

ARTICLE 212 - ADD THE FOLLOWING TO THE END OF THE FIRST SENTENCE OF PARAGRAPH 2: "AND SHALL FACILITATE THE ADOPTION OF ROUTING SYSTEMS DESIGNED TO MINIMIZE HAZARDS TO NAVIGATION AND THREATS TO THE COASTLINE AND RELATED INTERESTS OF COASTAL STATES."

ARTICLE 212 - A NEW PROVISION SHOULD BE ADDED (E.G., AS PARAGRAPH 2 BIS, ARTICLE 212) AS FOLLOWS: FOR PURPOSES OF PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT

AND HARMONIZATION OF REQUIREMENTS, STATES OF A REGION OR SUBREGION SHALL SEEK TO COORDINATE AND HARMONIZE THEIR LAWS AND REGULATIONS FOR THE PREVENTION, REDUCTION AND CONTROL OF MARINE POLLUTION FROM VESSELS PROCEEDING TO INTERNAL WATERS, OR A CALL AT A PORT FACILITY OUTSIDE
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INTERNAL WATERS, AND TO AGREE ON MEASURES FOR THE APPLICATION IN COMMON OF THE PROVISIONS OF ARTICLE 25. SUCH JOINT CONDITIONS AND MEASURES SHALL AT LEAST HAVE THE SAME EFFECT AS THAT OF GENERALLY ACCEPTED INTERNATIONAL RULES AND STANDARDS ESTABLISHED THROUGH THE COMPETENT INTERNATIONAL ORGANIZATION OR GENERAL DIPLOMATIC CONFERENCE, AND SHALL CONFORM TO PARAGRAPH 2 OF ARTICLE 21 WITH RESPECT TO SHIPS THAT ARE NOT PROCEEDING TO INTERNAL WATERS OR A CALL AT A PORT FACILITY OF A COASTAL STATE PARTY TO AN AGREEMENT UNDER THIS PARAGRAPH.

ARTICLE 212 - ADD TO THE END OF THE FIRST SENTENCE OF ARTICLE 212(3), "ENGAGED IN INNOCENT PASSAGE." ADD AN ADDITIONAL SENTENCE TO ARTICLE 212(3): "SUCH LAWS AND REGULATIONS SHALL AT LEAST HAVE THE SAME EFFECT AS THAT OF GENERALLY ACCEPTED INTERNATIONAL RULES AND STANDARDS ESTABLISHED THROUGH THE COMPETENT INTERNATIONAL ORGANIZATION OR GENERAL DIPLOMATIC CONFERENCE."

ARTICLE 212 - THE FOLLOWING AMENDMENT IS PROPOSED AS AN ADDITIONAL PARAGRAPH: "THE COASTAL STATE MAY REQUIRE NOTICE OF DISCHARGES OR OTHER VIOLATIONS OF THE LAWS AND REGULATIONS REFERRED TO IN PARAGRAPHS 3 TO 5 OF THIS ARTICLE, PROVIDED THAT INFORMATION SUPPLIED BY AN INDIVIDUAL PURSUANT TO SUCH A REQUIREMENT MAY NOT BE USED AGAINST THAT INDIVIDUAL IN THE DETERMINATION OF ANY CRIMINAL CHARGE MADE AGAINST HIM BY OR AT THE REQUEST OF THE COASTAL STATE."

ARTICLE 213 - AMEND PARAGRAPH 1 BY CHANGING THE PERIOD AT THE END OF THE FIRST SENTENCE TO A COMMA AND ADDING THE FOLLOWING: "AND THE SAFETY OF AIR NAVIGATION."

ARTICLE 221(6) - SUBSTITUTE "WHERE THERE IS CLEAR OBJECTIVE EVIDENCE" FOR "WHERE THERE ARE CLEAR GROUNDS FOR BELIEVING." DELETE "FLAGRANT OR GROSS." ADD "SIGNIFI-
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CANT," OR "SUBSTANTIAL," (OR A SIMILAR TERM) BEFORE

"DISCHARGE." DELETE THE WORD "MAJOR" IN THE PHRASE
"CAUSING MAJOR DAMAGE OR THREAT OF MAJOR DAMAGE." ADD IN
THE PENULTIMATE LINE AFTER "PROCEEDINGS," "INCLUDING
ARREST OF THE VESSEL," N.B. THIS WOULD NOT AFFECT THE

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TERM "MAJOR DAMAGE" IN ARTICLE 234 BECAUSE THERE IS NO
REQUIREMENT OF DISCHARGE UNDER THAT ARTICLE BEFORE
MEASURES MAY BE TAKEN, AND THEREFORE A HIGH STANDARD OF
DAMAGE IS NEEDED TO PREVENT UNREASONABLE ACTIONS.

ARTICLE 222 - ADD A NEW SECOND PARAGRAPH AS FOLLOWS:
FOR PURPOSES OF THIS CONVENTION, "MARITIME CASUALTY"
MEANS A COLLISION OF SHIPS, STRANDING OR OTHER INCIDENT
OF NAVIGATION, OR OTHER OCCURRENCE ON BOARD A SHIP OR
EXTERNAL TO IT RESULTING IN MATERIAL DAMAGE OR IMMINENT
THREAT OF MATERIAL DAMAGE TO A SHIP OR CARGO. ALTERNA-
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TIVELY, THIS DEFINITION COULD APPEAR IN ARTICLE 1.

ARTICLE 229 - IN THE FOURTH LINE, DELETE "BEYOND THE
TERRITORIAL SEA" AND INSERT "BEYOND THE ECONOMIC ZONE."
IN THE EIGHTH LINE, INSERT "OR THREAT OF MAJOR DAMAGE"
AFTER "MAJOR DAMAGE."

ARTICLE 231 - REDRAFT PARAGRAPH 1 AS FOLLOWS: EXCEPT FOR
VIOLATIONS COMMITTED IN INTERNAL WATERS OR THE TERRI-
TORIAL SEA, PENALTIES WITH RESPECT TO VIOLATION OF NA-
TIONAL LAWS AND REGULATIONS, OR APPLICABLE INTERNATIONAL
RULES AND STANDARDS FOR THE PREVENTION, REDUCTION AND
CONTROL OF POLLUTION FROM FOREIGN VESSELS MAY NOT INCLUDE
IMPRISONMENT, IN THE ABSENCE OF AGREEMENT TO THE CONTRARY
BY THE STATES CONCERNED, OR ANY OTHER FORM OF CORPORAL
PUNISHMENT.

REDRAFT THE SECOND PARAGRAPH AS FOLLOWS: 2. IN THE
CONDUCT OF PROCEEDINGS TO IMPOSE PENALTIES IN RESPECT OF
SUCH VIOLATIONS COMMITTED BY A FOREIGN VESSEL, RECOGNIZED
RIGHTS OF THE ACCUSED SHALL BE OBSERVED, INCLUDING THOSE
SPECIFIED IN ARTICLES 6 TO 11, 14 AND 15 OF THE INTER-
NATIONAL CONVENANT ON CIVIL AND POLITICAL RIGHTS.
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